

2010 MAY 17 PM 1:25

JEANNE HICKS, CLERK

BY: S. FIELDS ✓

Larry A. Hammond, 004049
Anne M. Chapman, 025965
OSBORN MALEDON, P.A.
2929 N. Central Avenue, 21st Floor
Phoenix, Arizona 85012-2793
(602) 640-9000
lhammond@omlaw.com
achapman@omlaw.com

John M. Sears
107 North Cortez Street
Suite 104
Prescott, Arizona 86301
(928) 778-5208
John.Sears@azbar.org

Attorneys for Defendant

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA

Plaintiff,

vs.

STEVEN CARROLL DEMOCKER,

Defendant.

No. P1300CR20081339

Division 6

**MOTION IN LIMINE TO
PREVENT THE STATE FROM
CALLING DEFENSE EXPERT
PETER BARNETT AS A
PROSECUTION WITNESS**

(Oral Argument Requested)

Pursuant to the Sixth, Eighth and Fourteenth amendments to the United States Constitution, Defendant Steven DeMocker requests that this Court enter an order *in limine* precluding the State from calling Peter Barnett, a defense expert, as its own witness. This Motion is supported by the following Memorandum and Points of Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

1 The defense disclosed Peter Barnett as a possible expert witness in this case on
2 crime scene interpretation, police practices and blood spatter evidence. As a result, the
3 state conducted a recorded interview of him in this case. Thereafter, the State recently
4 added Mr. Barnett to its witness list, apparently on the assumption that the defense
5 might not choose to call him. That assumption is correct, but for the following reasons,
6 Mr. Barnett may not then be called as a prosecution witness in this case.

7 There is little case law on this point in Arizona, but decisions in other
8 jurisdictions give this Court guidance.¹ A New Jersey court has held that “should the
9 defense elect not to present the expert as a witness after previously indicating to the
10 contrary, the fact that his otherwise confidential reports have been disclosed to the
11 prosecution does not entitle the State to call the expert as its witness over objection by
12 the defense. The testimony of a defense consultant concerning the substance of expert
13 services he has performed for the defense is exclusively available to the defense. If the
14 defense trial strategy results in his not being called to testify, his potential testimony on
15 that subject remains privileged from use by the State.” *State v. Mingo*, 392 A.2d 590
16 (N.J. 1978). Similarly, a Colorado court found that “the prosecution’s use of a defense
17 expert in its case-in-chief in the absence of waiver or compelling justification violates a
18 criminal defendant’s constitutional right to effective assistance of counsel.” *Hutchinson*
19 *v. State*, 742 P.2d 875 (Colo. 1987) (en banc). No such waiver or compelling
20 justification exists here. Finally, a North Carolina opinion concludes that “the trial court
21 erred when it allowed the State to compel testimony from [defense experts] that
22 defendant did not plan to call as witnesses. We believe that in so doing, the trial court
23 infringed upon the defendant’s Sixth Amendment right to effective assistance of
24

25
26 ¹ In *State v. Schaaf*, 169 Ariz. 323 (1991) (en banc), the Court held that allowing the State to call defendant’s
27 fingerprint expert was not an abuse of discretion despite defendant’s claim that doing so implicated work product.
28 No later cases cite this opinion, which is *dicta* because the trial court first found that defendant had waived his
right to challenge this.

1 counsel, and unnecessarily breached the work-product privilege." *State v. Dunn*, 571
2 S.E.2d 650 (N. Car. App. 2002).

3 Accordingly, any attempt by the State to call Mr. Barnett, in the absence of a
4 waiver from Mr. DeMocker, violates his Sixth Amendment right to the effective
5 assistance of counsel and the work-product privilege that exists between the defense and
6 the witness.

7 **CONCLUSION**

8 For these reasons, Mr. DeMocker requests that this Court order *in limine* that the
9 State is precluded from calling Peter Barnett as its own witness in this case.

10
11 DATED this 17th day of May, 2010.

12
13
14
15 By: 

16 John M. Sears
17 P.O. Box 4080
18 Prescott, Arizona 86302

19 OSBORN MALEDON, P.A.
20 Larry A. Hammond
21 Anne M. Chapman
22 2929 N. Central Avenue, Suite 2100
23 Phoenix, Arizona 85012-2793

24 Attorneys for Defendant

25 ORIGINAL of the foregoing filed
26 this 17th day of May, 2010, with:

27 Jeanne Hicks,
28 Clerk of the Court
Yavapai County Superior Court
120 S. Cortez
Prescott, AZ 86303

1 COPIES of the foregoing hand delivered
2 this 1st day of May, 2010 to:

3 The Hon. Thomas B. Lindberg
4 Judge of the Superior Court
5 Division Six
6 120 S. Cortez
7 Prescott, AZ 86303

8 Joseph Butner, Esq.
9 Prescott Courthouse Box

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28


